

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition
to Revoke Probation Against:

CINDY MARIE CUDNEY, R.C.P.,
1851 Hooker Oak Avenue
Chico, California 95926

Respiratory Care Practitioner
License No. 21840

Respondent.

Case No. R-2008

OAH No. N-2006011010

DECISION AFTER NON-ADOPTION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Sacramento, California on March 16, 2006.

Catherine Santillan, Senior Legal Assistant, Office of the Attorney General, Department of Justice, represented the Respiratory Care Board.

Cindy M. Cudney represented herself.

Evidence was received and the record was left open for both parties to make additional submissions of documents. The Deputy Attorney General requested leave to amend the Accusation and Petition to Revoke Probation and allege specific sections of the Business and Professions Code regarding cost recovery, as well as submit a proof of service for Dr. Middleberg's declaration in lieu of testimony. Ms. Cudney requested leave to submit letters of reference from the hospital where she works, a declaration and letters of recommendation. Leave was also provided both parties to submit additional written argument, commenting on any submission made by the parties.

The First Amended Accusation and Petition to Revoke Probation and the proof of service were submitted on March 21, 2006. The First Amended Accusation and Petition to Revoke Probation and its attachments were added to Exhibit 1. The proof of service for Dr. Middleberg's declaration in lieu of testimony pursuant to Government Code section 11514 was added to Exhibit 3, the Declaration and its attachments.

The Respiratory Care Board's (the Board) representative filed an objection on April 17, 2006, observing that Ms. Cudney had not timely filed her declarations and letters. She moved to close the record. On April 18, 2006, the documents filed by Ms. Cudney were received by the Administrative Law Judge, and copies were forwarded to the Board's representative. Receipt was confirmed. Ms. Cudney's submission offered additional written argument and comment about her exhibits. The Board's representative was afforded an additional week to reply but did not file any additional written argument and requested the matter be submitted. The matter was submitted on April 25, 2006.

On June 23, 2006, the Board issued a Notice of Non-Adoption of Proposed Decision. Thereafter, the Board requested written argument due on August 25, 2006. Written argument having been received from Complainant and Respondent, and the time for filing written argument in this matter having expired, the entire record, including the transcript of said hearing, having been read and considered pursuant to Government Code section 11517, the Board hereby makes the following decision:

FACTUAL FINDINGS

1. Stephanie Nunez made the charges and allegations contained in the Accusation and Petition to Revoke Probation in her official capacity as Executive Officer, Respiratory Care Board (Board), Department of Consumer Affairs, State of California. The Accusation and Petition to Revoke Probation was filed with the Board on January 6, 2006, and was timely served on Ms. Cudney. The First Amended Accusation and Petition to Revoke Probation was filed with the Board on March 17, 2006, and was timely served on Ms. Cudney. The Board has jurisdiction to revoke, suspend or otherwise impose disciplinary action upon any respiratory care practitioner in the State of California, provided cause for such action is proved by clear and convincing evidence.¹ In addition, the Board has jurisdiction to impose, modify or revoke terms and conditions of probation on any respiratory care practitioner licensee.²

2. Ms. Cudney timely filed a Notice of Defense to the Accusation and Petition to Revoke Probation. The Notice of Defense was deemed effective against the First Amended Accusation and Petition to Revoke Probation as well. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

3. The Board issued Ms. Cudney Respiratory Care Practitioner (RCP) license number 21840 on February 10, 2001, after having initially denied her application. The Board issued the license to Ms. Cudney following entry into a Stipulated Settlement with Ms. Cudney on December 4, 2000. The Stipulated Settlement was adopted by the Board and the license was issued, but was immediately revoked, and Ms. Cudney was placed on probation for three years, subject to terms and conditions. Among those terms and conditions of

¹ Business and Professions Code sections 3750, 3750.5, *Ettinger v. Medical Board of California* (1982) 135 Cal.App. 3d 835, 856.

² Business and Professions Code section 3750.

probation, Ms. Cudney was required to submit to biological fluids testing, abstain from alcohol and any drugs not lawfully prescribed for her, and to attend and complete an alcohol and drug treatment program.

4. The Board acted effective January 9, 2003, to revoke Ms. Cudney's respiratory care practitioner license, but stayed the revocation and placed her on three years probation. The action was the product of another Stipulated Settlement between the Board and Ms. Cudney to resolve allegations made against her in an Accusation and Petition to Revoke Probation. The Stipulation was executed November 11, 2002. Ms. Cudney agreed that all the factual and legal allegations made against her in the Accusation and Petition to Revoke Probation were true as part of the Stipulation. She admitted that she violated Business and Professions Code section 3750, subdivision (k), making grossly incorrect and inconsistent entries in patient charts, section 3750, subdivision (f), negligence, section 3750, subdivision (o), incompetence and section 3755, that she engaged in unprofessional conduct. Ms. Cudney also acknowledged that she violated the condition of her probation that required her to obey all laws.

5. The allegations resulting in the 2003 action all stemmed from Ms. Cudney's failure to competently care for a patient at Enloe Memorial Hospital, Chico, California on January 8, 2001, with respect to her providing intermittent positive pressure breathing treatment for a motor vehicle accident victim. Ms. Cudney left the patient to respond to a call to the Emergency Room without ceasing the treatment, and without making appropriate chart entries regarding his tracheotomy care and treatment; failed to note her observation of signs of fluid accumulation in the patient's airways; and failed to note that she had suctioned off fluid from the patient's lungs, and had observed coughing and other signs of respiratory distress. Ms. Cudney agreed to the entry of an agreed disciplinary order that revoked and reinstated her probation, again subject to terms and conditions. The probationary term was extended by the imposition of a three year probation that commenced effective January 9, 2003. Probationary terms included that Ms. Cudney completely abstain from alcohol and drug consumption, except as lawfully prescribed as part of a documented medical treatment plan, and to pay costs of \$2316.00, and to submit to random biological fluids testing. The license has been renewed and is due to expire January 31, 2007. The filing of the Accusation in the instant matter tolled the expiration of probation just before it was to be completed.

6. Before probation commenced, Ms. Cudney met with a Board probation monitor to discuss the terms and conditions of her probation. The probation monitor discussed the Board's Drug and Alcohol Testing Program and the manner in which probationers are selected for providing random bodily fluids specimens. She signed a Statement of Understanding and an acknowledgement on March 15, 2004, and May 14, 2004, confirming that she understood the terms and conditions of her probation and the manner in which the bodily fluids testing component would be administered.

7. On April 27, 2005, Ms. Cudney was randomly selected for provision of a bodily fluids specimen. She provided the specimen as requested. The specimen tested positive for the presence of propoxyphene, a Schedule IV controlled substance, within the

meaning of Health and Safety Code section 11530. Propoxyphene is the chemical name for the substance commonly known and marketed as Darvocet. The test methodology and the accuracy of the testing protocol and instruments used were adequately proved through hearsay declarations, supplemented by the testimony of the Board's probation monitor and Ms. Cudney, leading to a credible result.

8. Shortly after receiving the positive test results, Ms. Cudney's probation monitor contacted her and advised her of the "dirty" test. Ms. Cudney told the monitor that she was suffering from a severe migraine the day of the test and asked her sister for some of her sister's headache medication. She thought the medication was Imitrex, but did not ask.

9. On December 20, 2005, Ms. Cudney was again randomly selected to provide a bodily fluids specimen. She worked as a respiratory care practitioner during that day, and provided a urine specimen for testing at the end of her work day. Ms. Cudney has evidently changed the spelling of her first name, as she signed the specimen donation form "Cynde" Cudney, and the records of the testing of the specimen reflect that spelling. The specimen tested positive for the presence of hydromorphone, a Schedule II controlled substance, within the meaning of Health and Safety Code section 11530. Official notice is taken of the fact that hydromorphone hydrochloride is marketed under the trade name Dilaudid.³ It was not proved that Ms. Cudney was under the influence of the Dilaudid during her work shift.

10. In December, 2004, Ms. Cudney's probation monitor called her to advise of the positive test result and to ask for an explanation. Ms. Cudney told her that she had taken Tylenol and ibuprofen. During a second conversation a few weeks later, when the subject came up again, Ms. Cudney told the probation monitor that she "might have" taken her mother's cough medication. The probation monitor told Ms. Cudney to "quit taking other people's medications."

11. Ms. Cudney offered some curious testimony at the evidentiary hearing regarding her actions leading to the two dirty test results. She admitted she did not have a prescription for either medication she took, and that she was not under a physician's care on either occasion. Ms. Cudney attributed her first dirty test to carelessness and poor judgment. She testified that her mother was critically ill at the time and Ms. Cudney developed an intense migraine headache that all but immobilized her. She testified, "I did not think about what I was doing," when she described her decision to take her sister's headache medication. She also commented, "Who doesn't take other people's medications?" Her explanation regarding allegedly taking her mother's cough syrup was even more curious. She testified that her mother was famous in their family for putting medications in bottles that did not belong to the contents, and the cough syrup was in a Chloraseptic bottle. She explained that both she and her daughter took the cough syrup at the time of her mother's funeral, and described this period of time in her life as one of great upset, shock and confusion.

³ *Taber's Cyclopedic Medical Dictionary* (Edition 16, 1989, Philadelphia), p. 853.

12. Ms. Cudney wrote to the Board on May 10, 2005, following her first dirty test. She described the problem with the migraine and how her sister offered her “migraine medication.” She did not check with her sister to determine what she was taking until after she was informed of the dirty test. Her sister told her it was a “pain pill.” Her sister did not know Ms. Cudney was on probation to the Board because Ms. Cudney has never told any of her family about her probationary status or its limitations. She closed the letter by stating,

I am fully aware of the seriousness of this matter and would never [sic] to anything to jeopardize the career I love so passionately. I am severely sick to my stomach over this matter and want you to know that I have in no way relapsed. My career and my life today are far too important for that. I can only pray that you will find it in your hearts to allow for senselessness and stupidity and a lapse in thought this one time.

13. Ms. Cudney’s Supervisor Quarterly Report of Performance in evidence for October 31, 2005 through December 31, 2005, reflects Ms. Cudney typically works 72 hours in each two week period, predominately on the afternoon to evening shifts, at Enloe Hospital, Chico, California. Enloe is a 391 bed acute care hospital that employs approximately 30 respiratory care practitioners, including herself. Her work performance was rated “exceeds standards” in four of seven evaluative areas and meets standards in the remaining three in the performance report. She testified that she is a good therapist and she has learned a great deal as she has acquired experience in her work. She described herself as “very green” when she made the mistake that led to the first disciplinary action against her. She testified she has been given at least ten awards by the hospital for exceptional patient care and service. She introduced some, but not all, of these in evidence in her supplemental submission noted above.

14. Ms. Cudney offered a letter in evidence authored by her supervisor, Bob Morejohn, RCP, RPT, Technical Director of Respiratory Care at Enloe. He noted her consistent high quality of patient care, as evidenced by his own observations and many favorable comments she has received about her work from patients and peers. He noted that in his opinion, her honesty is her most impressive trait. He described how she came to him in December 2005 and reported to him that she had the two dirty tests for controlled medications. He advised that he has observed her at work and during social occasions around the hospital on numerous occasions and has never seen any evidence that she consumed any alcohol or drugs that would impair her behavior or care. He concluded by expressing his opinion that Ms. Cudney is a safe and competent practitioner and that he trusts her.

15. A second letter of reference was submitted by Ms. Cudney written by a 20 year respiratory care practitioner who has worked with Ms. Cudney over the past six years. She expressed her confidence in Ms. Cudney’s competence and skill as a practitioner. Two other coworkers, one the Enloe Clinical Laboratory Patient Support Clerk and the other a registered nurse who works with Ms. Cudney, expressed similar opinions in letters offered in Ms. Cudney’s supplemental submission of documents.

16. Ms. Cudney testified that she told her supervisor, Mr. Morejohn, all about her dirty tests and the circumstances of how she came to take the controlled medications as soon as she was notified by her probation monitor of the second positive test in late December 2005. Other supervisory personnel at the hospital also know of the results. She testified that she has not been placed on any work restrictions as a result of the tests.

17. Ms. Cudney has been on probation the entire period of her licensure. She expressed a mild resentment at the amount of money she has spent on her probation costs and monitoring, as well as the fact that she has never been able to practice with an unrestricted license. She was remorseful about making the mistakes she did and violating her probation twice in a several month period. She claimed the problems were both related to the demise of her mother's health condition, which resulted in her death at about the time of the second dirty test. She claims a sobriety date of September 7, 1996, and is proud of her sustained sobriety.

18. Evidence of the costs of investigation and enforcement of the action spent by the Board was introduced in the form of a declaration of the Attorney General's Senior Legal Analyst, submitted pursuant to Business and Professions Code sections 3753.5 and 3753.7. The costs consist of a claim for the services of the Senior Legal Analyst of a total of \$3312.00, for 36.0 hours of work. There is no detailed billing memorandum attached to the declaration, itemizing the tasks performed and the hours spent for each of the tasks.

19. The costs are presumed reasonable pursuant to the language of the statute, however, the Administrative Law Judge is required to make an independent analysis of the costs claim.⁴ The case is uncomplicated, involving two positive drug screen tests. Declarations had to be obtained from the Board's two expert witnesses, which were then served on Ms. Cudney. The costs claim reflects a claim of approximately a week's full-time work for a straightforward and uncomplicated matter. There is no evidence of extensive research, document assembly or interviews of witnesses. The Board called only its probation monitor and offered the declarations. A reasonable amount for costs of investigation and enforcement, considering the nature and complexity of the case, is \$2500.00.

LEGAL CONCLUSIONS

1. "The burden of proof in the administrative proceedings involving the revocation or suspension of a professional license is clear and convincing proof to a reasonable certainty."⁵ "Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind."⁶ The

⁴ *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

⁵ *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 835, 842, *James v. Board of Dental Examiners* (1985) 172 Cal. App. 3d 1096, 1105

⁶ *In Re David C.* (1984) 152 Cal.App. 3d 1189, 1208.

burden of clear and convincing evidence was applied to each allegation of the Accusation and the Petition.

2. The board may order the denial, suspension, or revocation of, or the imposition of probationary conditions upon, a license issued under this chapter, for any of the following causes:

¶...¶

(g) Conviction of a violation of any of the provisions of this chapter or of any provision of Division 2 (commencing with Section 500), or violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of this chapter or of any provision of Division 2 (commencing with Section 500).⁷

¶...¶

3. In addition to any other grounds specified in this chapter, the board may deny, suspend, or revoke the license of any applicant or license holder who has done any of the following:

(a) Obtained or possessed in violation of law, or except as directed by a licensed physician and surgeon, dentist, or podiatrist administered to himself or herself, or furnished or administered to another, any controlled substances as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with Section 4015) of Chapter 9.

(b) Used any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with Section 4015) of Chapter 9.

¶...¶

4. California Code of Regulations (CCR), title 16, section 1399.370, provides, in pertinent part;

For the purposes of denial, suspension, or revocation of a license, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a respiratory care practitioner, if it evidences present or potential unfitness of

⁷ Business and Professions Code section 3750, in pertinent part.

a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts include but are not limited to those involving the following:

(a) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any provision or term of the Act.

¶...¶

5. It was not disputed that Ms. Cudney engaged in unprofessional conduct within the meaning of sections 3750 and 3750.5 when she took controlled medications without a prescription and when not under a physician's care for a bona fide illness. There was also no dispute that her taking the medications was voluntary.

6. Ms. Cudney has been on probation and subject to bodily fluids testing for all of her six years as a licensee. Her explanations to her probation monitor and in her testimony for her conduct are a curious mix of not credible to absurd. She used exceptionally poor judgment and she was characterized by the Administrative Law Judge as being "clueless" with regard to her comment about "everyone" taking other people's medications. There was one point in her testimony where it was clear she did not understand the correlation between exercise of poor judgment in her personal affairs and the significant concern that the poor judgment will carry over into her professional life and negatively impact patient care. The Board is under no obligation to wait until a patient is harmed to arrest such exercises of poor judgment by the imposition of disciplinary action, where legally and factually appropriate. In sum, legal cause exists to revoke or suspend Ms. Cudney's license for violations of sections 3750, 3750.5 and CCR, title 16, section 1399.370, as that section interacts with the two former provisions.

7. It was not disputed that Ms. Cudney violated her probation on two separate and distinct occasions, in May 2005 and December 2005, as set forth in the Factual Findings. Ms. Cudney violated the provisions of her probation that required her to "Obey All Laws," and to abstain from consuming any mood altering substance without a lawful prescription that is part of a documented treatment plan overseen by a physician for a bona fide illness. Separate legal cause exists to revoke Ms. Cudney's previous grant of probation and reinstate the stayed revocation of her license.

8. The license revocation procedure is designed to protect the public, not to administer punishment to individual licensees.⁸ "The object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated

⁸ *Ettinger v. Board of Medical Quality*, supra, 135 Cal.App.3d at p. 856.

business clean and wholesome.”⁹ The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.¹⁰

9. The determination of an appropriate penalty for the violations proved is a matter of weighing the gravity of the violations against any facts in mitigation or rehabilitation. Ms. Cudney submitted letters from her work supervisor and colleagues that reflect her competence and skill as a practitioner. Notwithstanding her professional skills, her judgment is at issue. Ms. Cudney had two positive tests in a seven month time period. After the first positive test in May 2005, she stated to her probation monitor that it would not happen again, yet she repeated the same behavior: taking a family member’s medication which resulted in a “dirty” test. Respondent’s poor judgment in using other people’s medications and her failure to realize the significance of this has a negative impact on her fitness to continue practicing. Despite the fact that respondent has been on probation since her initial licensure, at the hearing it was evident that she did not realize that her poor judgment in her personal life carries over to her ability to practice respiratory therapy.

10. Business and Professions Code section 3753.1 provides;

(a) An administrative disciplinary decision imposing terms of probation may include, among other things, a requirement that the licensee-probationer pay the monetary costs associated with monitoring the probation.

(b) The board shall not renew or reinstate the license of any licensee who has failed to pay all of the costs ordered under this section once a licensee has served his or her term of probation.

11. The Board may request the Administrative Law Judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case under Business and Professions Code section 3753.5. Business and Professions Code section 3753.7 provides: For purposes of this chapter, costs of prosecution shall include attorney general or other prosecuting attorney fees, expert witness fees, and other administrative, filing, and service fees.

Zuckerman v. Board of Chiropractic Examiners (2002) 29 Cal.4th 32, requires the consideration of the following factors in determining the amount of costs to be assessed:

- The board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a licensee who has committed some misconduct, but

⁹ *Id.*, quoting *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.

¹⁰ *Ettinger*, supra, at 856, quoting *Meade v. State Collection Agency Board* (1960) 181 Cal.App.2d 774, 776 and *West Coast Co. v. Contractors' Board* (1945) 72 Cal.App.2d 287, 301-302.

who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed.

- The board must consider the licensee's subjective good faith belief in the merits of his or her position.
- The board must consider whether the licensee has raised a colorable challenge to the proposed discipline.
- Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation, the board must determine that the licensee will be financially able to make later payments.
- Finally, the board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct.

12. The *Zuckerman* factors were carefully considered by the Administrative Law Judge in this matter. The Board prevailed on the factual and legal allegations, which were not really in dispute. As set forth in the Factual Findings, \$2500.00 is a reasonable amount for the investigation and enforcement activity as evaluated by the *Zuckerman* factors and the nature and circumstances of this case.

ORDER

Respiratory Care Practitioner License number 21840, issued by the Respiratory Care Board to Cindy Marie Cudney, R.C.P., is REVOKED. The Petition to Revoke Probation is GRANTED. The previously imposed probation is REVOKED and TERMINATED, and the previously imposed revocation of the license is REINSTATED.

Respondent shall pay to the Board a sum not to exceed the costs of the investigation and prosecution of this case. That sum shall be \$2,500.00, and shall be paid in full directly to the Board on terms to be determined by the Board.

This Order shall become effective on December 15, 2006.

IT IS SO ORDERED this 8th day of December, 2006.

Original signed by:

LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS